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In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY ALLEVATO, Personal Representative of MICHAEL J. FERRANTINO, SR., Deceased, *et al.*,
Petitioners,

v.

COUNTIES OF OAKLAND AND MACOMB
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Reply Brief of Petitioner

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REPLY BRIEF OF PETITIONER NANCY ALLEVATO,
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1. Introduction. The Briefs in Opposition filed by the County of Oakland ("Oakland") and the County of Macomb ("Macomb") (collectively "Oppositions")[1] offer no good reason why this Court should deny certiorari. Both Oppositions readily admit that, pursuant to Michigan law, Oakland and Macomb accomplished a *perfect* pass on to their municipal customers of 100 percent of the alleged overcharges and they suffered no monetary loss or damages because they are prohibited by Michigan law from retaining profits or excess revenues from the funds collected by them to pay the City of Detroit for the sewerage services.

Both Oppositions distort the real issue before the Court by asserting that the issues presented are of little importance; by engaging in semantic gymnastics and labeling relating to the pass on defense; by relying on irrelevant tracing problems; by arguing that they suffered hypothetical and speculative injuries; and by denying the existence of a clear conflict in the Circuits, despite the Sixth Circuit's own recognition of the conflict. These Oppositions should not be permitted to succeed.

2. Certiorari Is Proper Here. Realizing the conflict in the Circuits and the Decision's clear divergence from existing Supreme Court precedent, the Counties make numerous backhanded arguments asserting this case is not worthy of certiorari. Among the most curious is that certiorari should not issue because it "will have little impact on the *majority* of antitrust or RICO actions." (Oakland Opp. at 28 (emphasis added)). This is no doubt true; one is hard pressed to imagine any issue that would impact *a majority* of antitrust cases. The issue of the perfect pass on, while not affecting the majority of antitrust cases, has recently presented itself in the certiorari petition in *Kansas* v. *The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989) (No. 88-2109). Moreover, a multitude of counties, municipalities and regulated entities engage in transactions where, by statute or regulation, a perfect pass on of

[1]Petitioners have filed this Reply to both Oppositions.

overcharges may occur. A grant of certiorari here will have wide ranging applicability because of the number of contractual or legally regulated relationships where the issue of a perfect pass on and standing could exist.

Despite Oakland's bald assertion to the contrary (*see* Oakland Opp. at 28), the threat of double recovery is very real because the Sixth Circuit embraced the *Seventh Circuit's* decision in *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, ___U.S. ___, 109 S.Ct. 543 (1988), to the extent it permits the *offensive* use of the pass on theory, but simultaneously rejected its defensive use. (Petition at 17; 27a-28a; 866 F.2d at 852). If certiorari is denied, it is therefore not, as Oakland claims, "axiomatic" that the class action will be dismissed because the class, consistent with *Panhandle Eastern* and the Sixth Circuit's Decision, may try to offensively assert pass on. This is precisely the result rejected by this Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 728-36 (1977). Given this, it hardly matters when or why the class action in this case was filed. (*See* Oakland Opp. at 25).

The Decision also has the undesirable effect of giving the Counties, and for that matter, all cities and other political subdivisions, "roving" standing to sue for any injury to their general economy, whether or not occasioned by direct purchases tainted by antitrust violations. This type of injury (*see* 866 F.2d at 846-47; Petition at 14a-15a; Oakland Opp. at 20-21), has no relationship whatsoever to a direct purchase by the Counties and would give any municipality or county in the United States standing to sue for *any* antitrust, RICO or other violation of law that has the effect of deterring people or businesses from locating or remaining in such municipalities or counties. (*See* Petition at 12).

3. This Case Presents a Perfect Pass On And Falls Squarely Within The Exceptions To *Hanover Shoe* and *Illinois Brick*. Macomb acknowledges that "[by] virtue of State law, the 'perfect pass on' truly has been created." (Macomb Opp. at 11). Michigan law requires the Counties to charge their municipal customers (which, in turn, charge the end-users) for 100 percent of the costs of providing sewerage services, including the cost of the component waste hauling services, which were allegedly inflated.

(Macomb Opp. at 9-10). In addition, the Counties are prohibited from retaining any profits or excess revenues from the costs charged to provide the sewerage services. (*Id.* at 9-11). Oakland's Opposition also acknowledges the perfect pass on. (Oakland Opp. at 6).

The perfect pass on precisely embodies the economic circumstances discussed by this Court in its examples of the exceptions to the rule in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick*, 431 U.S. 720. These economic circumstances exist where the direct purchaser is fully insulated from any harm because the overcharge and its effect can be determined without reference "to the interaction of supply and demand that complicates the general case." *Illinois Brick*, 431 U.S. at 736; *see also Hanover Shoe*, 392 U.S. at 494. Petitioners and the Counties agree that the complexities associated with analyzing these market forces were the primary concern of *Hanover Shoe* and *Illinois Brick*. (Oakland Opp. at 15; Macomb Opp. at 7).

The Counties do not attempt to deny that they were fully insulated from the alleged overcharge or that its effect could be determined without reference to market forces. Instead, they engage in a game of labeling. (*See* Oakland Opp. at 18-20). Oakland first asserts that the contracts at issue do not fall under the "cost plus exception" because they were not for *fixed quantities*. Oakland also claims that Petitioners are attempting to manufacture a *new* exception, which they contend is expressly prohibited by this Court. (Oakland Opp. at 16, 19).

The Counties' approach exalts form over substance because the policy considerations of *Illinois Brick* indicate that the *examples* of exceptions recognized by this Court were not meant to be exclusive. *See Panhandle Eastern*, 852 F.2d 891; *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir.), *petition for cert. filed sub nom. Kansas* v. *The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989) (No. 89-2109); *In re Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1292-93 (D. Md. 1981). Petitioners are not attempting to manufacture a new exception, but are calling this Court's attention to a transaction which is the perfect example of when pass on should be applied. Here the Counties were fully and completely insulated from any injury from a decrease in sales because their "profits" would be unchanged since they are

only conduit collection agents that have no "profits". In other words, the Counties' cost-plus contracts were really cost-*only* contracts.

4. The Alleged Tracing Problems Presented in the Oppositions Were Not A Concern in *Hanover Shoe* and *Illinois Brick*. Both *Hanover Shoe* and *Illinois Brick* were cases involving persons along an economic chain of distribution, each of which *may* have absorbed a certain amount of the alleged overcharges. This Court refused to allow the use of pass on because of the evidentiary problems resulting from tracing the overcharge by reconstructing and analyzing the interaction of the market forces of supply and demand facing parties at *different levels* of an economic distribution chain. *Hanover Shoe*, 392 U.S. at 492-93; *Illinois Brick*, 431 U.S. at 731-32, 737, 741-42. Where such complexities do not exist, for example, pursuant to a pre-existing cost-plus contract, nothing prevents the use of pass on. *Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 736.

The tracing problems cited in the Oppositions, which result from the apportionment of damages among persons (the end-users) at the *same* level of an economic distribution chain, were not at issue in, or relevant to the rationale of *Hanover Shoe*, and *Illinois Brick*. These tracing problems emphasized by the Counties do not involve market forces and are routinely encountered in any class action or multi-party suit.[2] Moreover, the Counties acknowledge that the tracing problems referred to are indeed surmountable because, as Macomb asserts, if the Counties recover from Petitioners, their recovery "can be refunded to the constituent communities. . . ." (Macomb Opp. at 11; *see also* Oakland Opp. at 23 n.15). Thus the Counties assert that they will apportion their recovery, if any, to the end-users while asserting, at the same time in this Court, that the impossibility of such apportionment gives them standing to sue.

The Sixth Circuit's consideration of these tracing problems adds a new policy consideration to pass on cases that was not addressed in *Hanover Shoe* and *Illinois Brick*. Certiorari is therefore proper to

[2]Indeed, *Illinois Brick*'s discussion of the "control exception," 431 U.S. at 736 n.16, implicitly recognizes that only tracing problems among different levels of an economic distribution chain are relevant because numerous persons could have made purchases from the controlled entities. Yet the Court makes no reference to tracing problems among these purchasers.

allow this Court to address this consideration because of its broad application to the multitude of other similarly situated contractual and legally regulated relationships.

Another curious point in the Oppositions is the insistence that enforcement of the antitrust laws would be impaired by denying standing to the Counties because the end-users would have a "tiny stake" in the outcome of any lawsuit. First, as discussed in the Petition, the end-users have already filed a class action. Second, the Counties would have even less than a "tiny stake" in any lawsuit because, as they admit, they must, under Michigan law, refund their entire recovery to the end-users. Moreover, this "enforcement rationale" is given secondary status by this Court where problems of tracing overcharges between different levels of an economic distribution chain are not present. (*See* Petition at 14 n.16).

5. The Counties Suffered No Other Cognizable Injuries. Realizing that the Counties suffered no cognizable injury from the alleged overcharges because of the perfect pass on, the Counties' Oppositions literally manufacture injuries that were neither alleged in their Complaints nor presented to the Sixth Circuit. (Oakland Opp. at 19-21; Macomb Opp. at 10-12). Oakland attempts to demonstrate a residual injury, by citing *Carter* v. *Berger*, 777 F.2d 1173 (7th Cir. 1985), for the proposition that a "wronged" County will not "*necessarily* recoup all of its injury" from alleged RICO violations. (Oakland Opp. at 20 (emphasis added)). *Carter*, however, is completely inapplicable because the wronged county (Cook County, Illinois) was *not* insulated from market forces because it was not *required by law* to recoup any monetary injury suffered and in fact faced serious political considerations against raising the taxes of its constituents to recoup such losses. The Counties here must *necessarily* recoup their injury as they are mandated by Michigan law to pass on 100 percent of any overcharges to their municipal customers.

The residual injury Oakland attempts to demonstrate is the hypothetical injury to the desirability of the Counties as places to live and work and the consequential impairment of the Counties' revenue raising capacity. Their citation to *Carter* is erroneous because the court in *Carter* recognized the concern over this type of harm only as a *political constraint* on Cook County's choice to raise taxes

to recoup its losses, not as an injury in and of itself. 777 F.2d at 1177. The Counties here *cannot* make political choices because Michigan law *mandates* a perfect pass on of the overcharges. Moreover, even if this can be considered an "injury," this injury was neither plead nor argued by the Counties; is not a recognizable antitrust injury; is too speculative to be compensable under the antitrust laws; and is, in essence, an attempt by the Counties to sue as *parens patriae*. (Petition at 12, 22). However, counties cannot sue as *parens patriae* for injuries to their general economies. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263-64 (1972); *City of Rohnert Park* v. *Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979).

Macomb also asserts a derivative injury because any damages recovered by the Counties will "accrue to the benefit of the end purchasers," and "the economic benefit of the recovery is thus apportioned *to those who were injured by the illegal acts*." (Macomb Opp. at 11). Thus, Macomb County admits that the Counties suffered *no* injury, but persists in arguing that it is the proper plaintiff as a representative of the end-users. As a matter of law, the Counties do not have standing to sue for damages to the end-user (citizens) because the Counties' power is only derivative and not sovereign and they cannot sue as *parens patriae*. *City of Rohnert Park*, 601 F.2d at 1044. Only state attorneys general may sue as *parens patriae* pursuant to 15 U.S.C. § 15c (Supp. 1989). Counties, cities and other political subdivisions cannot.

6. The Decision Conflicts With Decisions From Other Circuits. The Petition aptly points out that the Sixth Circuit's Decision conflicts with the Seventh Circuit's decision in *Panhandle Eastern* and with the Tenth Circuit's decision in *Wyoming Tight Sands*. The Sixth Circuit itself recognized the direct conflict with *Panhandle Eastern*. (866 F.2d at 852; Petition at 27a-28a). Macomb asserts, without any support, that the Decision does not conflict with *Panhandle Eastern*. (Macomb Opp. at 1, 4). Oakland, on the other hand, first asserts, without elaboration, that *Panhandle Eastern* is factually distinguishable. (Oakland Opp. at 25-26). However, *Panhandle Eastern* held that the cost plus exception is available where problems of tracing the absorption of an overcharge among successive links on the chain of distribution are not present, whether or not a contract was for a fixed quantity. 852 F.2d at 896-98. Oakland's

distinctions are distinctions without a difference because they were not relied upon in any way by the Seventh Circuit.

Because it recognizes the significant conflict among the Circuits, Oakland asserts that *Panhandle Eastern* is bad law because it somehow wrongfully departs from the earlier Seventh Circuit decision in *Carter* v. *Berger*. This argument is nonsense. First, as discussed above, *Carter*, while involving a governmental entity, did not involve a perfect pass on, whereas, *Panhandle Eastern* did involve a perfect pass on. Second, *Carter* involved RICO, whereas *Panhandle Eastern* involved the antitrust laws. Third, *Panhandle Eastern* was an *en banc* decision of the Seventh Circuit, whereas *Carter* was an earlier panel decision of the same court.[3]

Oakland finally attempts to quixotically attack this obvious conflict by arguing that the Sixth Circuit's Decision is somehow better law than *Panhandle Eastern*, claiming that the Seventh Circuit was "rejected" in *Wyoming Tight Sands*, 866 F.2d at 1293. (Oakland Opp. at 26-27). Yet, as noted in the Petition, *Wyoming Tight Sands* only rejected a part of *Panhandle Eastern* (not at issue here), and is in harmony with *Panhandle Eastern*, and in conflict with the Decision, in holding that pass on may be used where a perfect pass on exists, and, as here, the issue of decreased demand due to higher prices is not presented. (Petition at 20).[4]

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[3]Even if there was some conflict between *Carter* and *Panhandle Eastern*, *Panhandle Eastern* is authoritative law. *Powell* v. *United States*, 338 F.2d 556, 557 (7th Cir. 1964). Not surprisingly, Oakland fails to cite or note the fact that *Panhandle Eastern* was an *en banc* decision.

[4]Petitioner's contrasting of the different goals of RICO and the antitrust laws is indeed relevant because the Decision merely assumed that the antitrust precedent was applicable, stating that its antitrust discussion "is also applicable to the treble damages provision of RICO." (866 F.2d at 851; Petition at 25a). Oakland's assertion that the Sixth Circuit "did not rely on antitrust precedent in finding that the Counties had standing under RICO" is erroneous. (*See* Oakland's Opposition at 23 n.16).

7. Conclusion. For the reasons stated herein and in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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